Kanawagi s/o Seperumaniam v Penang Port Commission

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2–24–5 OF 2000
FAIZA TAMBY CHIK J
16 JANUARY 2001

Civil Procedure *— Judgment — Enforcement of judgment — Summary judgment obtained against defendant — Duty of defendant to give effect to judgment — Failure of defendant to give effect to judgment — Whether plaintiff has liberty to apply for consequential order to give effect to judgment*

Civil Procedure *— Res judicata — Judgment — Drawn up and perfected — Plaintiff's application for consequential relief to give effect to judgment — Judgment drawn up and perfected operated as res judicata for defendant to challenge — Whether plaintiff's application an attempt to reopen original case — Whether on the facts the court ought to invoke principle of res judicata*

Civil Procedure *— Res judicata — Issue estoppel — Plaintiff's application for consequential relief — Whether issue of estoppel applies*

Civil Procedure *— Summary judgment — Final judgment — Dispute as to entitlement of remedy under judgment — Judgment final and indisputable, res judicata*

Limitation *— Accrual of cause of action — Application for consequential relief to give effect to judgment — Whether plaintiff relying on new cause of action*

The plaintiff was dismissed by the defendant in 1985. He filed an action against the defendant and filed an O 14 summary judgment application. The application had three main prayers. In prayer one, the plaintiff sought for a declaration that the defendant's action in terminating the plaintiff's services was ultra vires the Penang Port Commission Act and therefore, null and void and invalid. On 18 July 1994, the High Court gave an order in terms for prayers one and three. There was no appeal filed on these orders of the High Court. The plaintiff filed the present originating summons seeking the consequential reliefs to enable him to retain his employment and continue eligibility to be paid his salaries and all other emoluments and allowances from the date of the court order dated 18 July 1994. The plaintiff submitted that even though the court had given a declaration that his dismissal by the defendant in 1985 was null and void and invalid and which order require the defendant to reinstate the plaintiff, the defendant refused to reinstate the plaintiff and by that refusal the plaintiff had come to this court for redress to compel the defendant to reinstate the plaintiff as a consequent to the order made by the court on 18 July 1994. The defendant resisted the plaintiff's claim and relied upon the following grounds: (i) plaintiff was reopening the original case and should not be permitted as it would result in multiplicity of proceedings applying the law of res judicata and issue of estoppel; (ii) plaintiff's action was barred by limitation;

and (iii) the plaintiff was approbating and reprobating in that the plaintiff having elected to claim damages for wrongful termination and having been awarded over RM2m, could not now seek reinstatement.

Held:

(1) The defendant had conceded that they did not appeal against prayer one. That being so the dispute in prayer one between the plaintiff and the defendant was final, the plaintiff's cause of action forming the subject matter of prayer one having merged into the order of the court dated 18 July 1994. That order operated as res judicata and closed the door to the defendant to challenge this decision in any manner whatsoever. As long as this court was concerned, the decision given by the court on 18 July 1994 was final. The order stands and the plaintiff can give effect to it (see pp 450E–F, 451B, C).

(2) This was not an application by the plaintiff to reopen the original case and vary, alter or amend the order made by the court on 18 July 1994. The present action arose as a result of the defendant's obstinate disobedience to give effect to that order made on 18 July 1994 that the plaintiff was compelled to seek consequential orders to give effect to it. Thus, the rules of res judicata, issue estoppel and *functious officio* were not applicable (see p 454F–G).

(3) The plaintiff in the present action was not relying on any new cause of action and which fact is vital for the operation of the law of limitation. For limitation in a case of contract like the present case time runs from the date of the breach. The plaintiff's cause of action had already been adjudicated and it had merged into the order of the court dated 18 July 1994. Therefore, there was no cause of action involved in this case to attract the law of limitation (see p 455C–D).

(4) If the defendant wanted to dispute that the plaintiff was only entitled to one remedy between prayers one and three then the defendant should have taken up that argument in the earlier trial and not at this forum for by this time the judgment given in the form of prayer one and prayer three is now final and indisputable by the law of res judicata. This means that the plaintiff was entitled to the benefit of both prayer one and prayer three (see p 455F–G).

(5) The defendant had dismissed the plaintiff from his employment and the court had declared that the dismissal was null and void and since the law is that employment is a fundamental right within the expression of art 5(1) of the Federal Constitution, it is imperative that the function of the court to ensure that the plaintiff gets back his job and together with his arrears of salaries and all other emoluments (see p 467C).

(6) By law the defendant was under duty to give effect to the order of the court dated 18 July 1994. Though the order made was a

declaratory order it is still an order of the High Court and carries the command that it should be given effect. This is particularly so when there was no challenge that the order made was without jurisdiction and/or the order was irregular or a nullity order (see p 467F–G).

(7) Since the defendant had not given effect to the declaratory order, the plaintiff was entitled to apply to the court under the 'liberty to apply rule' for the purpose of implementing and give effect to that order. The court of first instance hearing an application for consequential relief has the powers to dispense appropriate remedies under the heading of 'other relief the honourable court deems fit'. Since the plaintiff in the main case had asked for 'any other relief that the honourable court thinks fit', the consequential relief sought by the plaintiff in substance emanates from the plaintiff's prayers of 'further or other relief that the honourable court deems fit' in the main action (see pp 468H, 469C–D).

[Bahasa Malaysia summary

Plaintif telah dipecatkan oleh defendan pada tahun1985. Beliau telah memfailkan satu tindakan terhadap defendan dan memfailkan A 14 permohonan penghakiman terus. Permohonan tersebut mempunyai tiga permohonan utama. Di dalam permohonan satu, plaintif telah memohon satu deklarasi bahawa tindakan defendan menamatkan khidmat plaintif adalah ultra vires Akta Suruhanjaya Pelabuhan Pulau Pinang dan oleh itu, adalah batal dan tak sah. Pada 18 Julai 1994, Mahkamah Tinggi telah memberikan satu perintah seperti dipohon untuk permohonan satu dan tiga. Tiada rayuan telah difailkan terhadap perintah-perintah Mahkamah Tinggi tersebut. Plaintif telah memfailkan saman pemula sekarang ini memohon relief berbangkit untuk membolehkan beliau mengekalkan pekerjaan beliau dan meneruskan kelayakan untuk dibayar gaji beliau dan semua emolumen dan elaun yang lain daripada tarikh perintah mahkamah bertarikh 18 Julai 1994. Plaintif telah menghujahkan bahawa walaupun mahkamah telah memberikan satu deklarasi bahawa pemecatan beliau oleh defendan pada tahun 1985 adalah batal dan tak sah dan perintah yang mana yang dipelukan oleh defendan untuk mengembalikan jawatan plaintif, defendan enggan untuk mengembalikan jawatan plaintif dan disebabkan keengganan tersebut plaintif telah datang ke mahkamah ini untuk membetulkan keadaan agar mendesak defendan untuk mengembalikan jawatan plaintif sebagai satu akibat langsung daripada perintah yang dibuat oleh mahkamah pada 18 Julai 1994. Defendan menentang tuntutan plaintif dan bergantung kepada alas-alasan berikut: (i) plaintif telah membuka semula kes asal dan tidak sepatutnya dibenarkan keran ia akan membawa kepelbagaian prosiding dengan menggunakan undang-undang res judicata dan isu estopel; (ii) tindakan plaintif dihalangkan oleh had masa; dan (iii) plaintif antara membenarkan dan

tidak di mana plaintif setelah dilantik untuk menuntut ganti rugi kerana pemecatan salah dan telahpun diawardkan lebih RM2j, untuk sekarang tidak memohon pengembalian jawatan. A

Diputuskan:

(1) Defendan telah mengaku bahawa mereka tidak membuat rayuan terhadap permohonan satu. Jika demikian halnya pertikaian di dalam permohonan satu antara plaintif dan defendan adalah muktamad, kausa tindakan plaintif yang membentuk perkara pokok permohonan satu setelah bergabung di dalam perintah mahkamah bertairkh 18 Julai 1994. Perintah tersebut berfungsi sebagai res judicata dan menutup peluang kepada defendan untuk mencabar keputusan ini dalam apa cara sekalipun. Selagi mahkamah ini berkaitan, keputusan yang diberikan oleh mahkamah pada 18 Julai 1994 adalah muktamad. Perintah tersebut dikekalkan dan plaintif boleh bertindak atasnya (lihat ms 450E–F, 451B, C). B C D

(2) Ini bukan merupakan satu permohonan oleh plaintif untuk membuka semula kes asal tersebut dan mengubah atau meminda perintah yang telah dibuat oleh mahkamah pada 18 Julai 1994. Tindakan sekarang ini timbul akibat daripada keingkaran yang ketegar defendan untuk bertindak atas perintah yang dibuat pada 18 Julai 1994 bahawa plaintif didesak untuk memohon perintah-perintah penting untuk bertindak atasnya. Oleh itu peraturan res judicata, isu estopel dan functious officio tidak terpakai (lihat m 454F–G). E

(3) Plaintif di dalam tindakan sekarang ini tidak bergantung kepada mana-mana kausa tindakan yang baru dan atas hakikat itu adalah penting bagi fungsi undang-undang had masa. Bagi had masa di dalam kes kontrak seperti di dalam kes sekarang ini masa bermula daripada tarikh pelanggaran. Kausa tindakan plaintif telahpun diadili dan telah bergabung di dalam perintah mahkamah bertarikh 18 Julai 1994. Oleh itu tiada kausa tindakan yang wujud di dalam kes ini yang menggunakan undang-undang had masa (lihat ms 455C–D). F G

(4) Jika defendan ingin mempertikaikan bahawa plaintif hanya berhak kepada satu remedi antara permohonan 1 dan 3 maka defendan sepatutnya telah bertindak terhadap hujah di dalam perbicaraan terdahulu dan bukan di dalam forum ini kerana menjelang masa ini penghakiman yang diberikan dalam bentuk permohonan satu dan tiga sekarang adalah muktamad dan tidak boleh dipertikaikan oleh undang-undang res judicata. Ini bermakna bahawa plaintif berhak untuk mendapat faedah daripada permohonan satu dan tiga (lihat ms 455F–G). H

(5) Defendan telah memecat plaintif daripada pekerjaan beliau dan mahkamah telah mengisytiharkan bahawa pemecatan tersebut adalah batal dan tak sah dan memandangkan adalah undang- I

undang bahawa pekerjaan adalah hak asas dalam ungkapan perkara 5(1) Perlembagaan Persekutuan, adalah imperatif bahawa fungsi mahkamah untuk menentukan bahawa plaintif mendapat balik pekerjaan beliau dan juga tunggakan gaji beliau dan semua emolumen yang lain (lihat ms 467C).

(6) Melalui undang-undang defendan di bawah kewajipan untuk bertindak atas perintah mahkamah bertarikh 18 Julai 1994. Walaupun perintah yang dibuat merupakan satu perintah deklarasi ia masih satu perintah Mahkamah Tinggi dan membawa arahan bahawa ia hendaklah bertindak ke atasnya. Ini terutamanya adalah apabila tiada cabaran bahawa perintah yang dibuat adalah tanpa bidang kuasa dan/atau perintah tersebut adalah di luar aturan atau satu perintah yang tidak sah (lihat ms 467F–G).

(7) Memandangkan defendan tidak bertindak ke atas perintah deklarasi tersebut, plaintif berhak untuk memohon kepada mahkamah di bawah 'kebebasan untuk menggunakan peraturan tersebut' bagi tujuan pelaksanaan dan bertindak ke atas perintah tersebut. Mahkamah yang pertama kali mendengar satu permohonan untuk relief berbangkit mempunyai kuasa untuk melaksanakan remedi-remedi yang sesuai di bawah tajuk 'relif lain yang mahkamah yang bijaksana fikirkan suaimanfaat'. Memandangkan plaintif di dalam kes utama telah menanyakan untuk 'apa-apa relief lain yang mahkamah yang bijaksana fikirkan suaimanfaat', relief berbangkit yang dipohon oleh plaintif pada mana datang daripada permohonan plaintif di mana 'relief selanjutnya dan lain yang mahkamah yang bijaksana fikirkan suaimanfaat' di dalam tindakan utama tersebut (lihat ms 468H, 469C–D).]

Notes

For cases on res judicata generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3959–4032.

For cases on accrual of cause of action, see 9 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1740–1742.

For cases on summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4778.

For cases on enforcement of judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2581–2582.

Cases referred to

Addis v Gramophone Co Ltd (1909) AC 488 (refd)

Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 (refd)

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 28 MLJ 169 (refd)

Christel v Christel [1951] 2 KB 725 (refd)
Cox v Phillips Industries Ltd [1976] 1 WLR 683 (refd)
Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101 (refd)
Dehli Transport Corp v DTC Mazdoor Congress & Ors 1991 Supp 1 SCC 600 (refd)
Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196 (refd)
Fritz v Hobson (1880) 14 Ch D 542 (refd)
Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74 (refd)
Government of Malaysia v Rosalind Oh Lee Pek Inn [1973] 1 MLJ 222 (refd)
Hadkinson v Hadkinson [1952] 2 All ER 567 (refd)
Haji Mohd Yusof bin Salleh lwn Ketua Pengarah Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah dan Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah Dalam Mahkamah Tinggi Malaya di Kuala Lumpur Guaman Sivil No S7–22–193 Tahun 1990 (refd)
Haji Osman bin Mohd Said v Ketua Pengarah Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah; Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah High Court of Malaya at Kuala Lumpur Civil Suit No S5–22–194–90 (refd)
Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira s/o Pereira & Ors [1996] 3 MLJ 489 (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)
Hedley v Baxendale (1854) 9 Ex 341; 156 ER 145 (refd)
Heywood v Wellers [1976] 1 All ER 300 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal [1996] 1 MLJ 481 (refd)
Jarvis v Swan Tours Travel [1973] 1 All ER 171 (refd)
Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l Perumal [2000] 3 MLJ 281 (refd)
Leong Ah Weng v Neoh Thean Soo & Anor [1983] 2 MLJ 119 (refd)
Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd [1990] 2 MLJ 423 (refd)
Mahan Singh v Government of Malaysia [1978] 2 MLJ 133 (refd)
Malik v Bank of Credit and Commerce International SA [1997] 3 WLR 95 (refd)
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361 (refd)
Nasri v Mesah [1971] 1 MLJ 32 (refd)
Nicholson v Nicholson ALR Vol 4 1997 p 212 (refd)
Panalal v State of Madhya Pradesh AIR 1976 MP 48 (refd)
Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia [1988] 1 MLJ 302 (refd)
Penrice v Williams (1883) 23 Ch D 353 (refd)

Permodalan MBf Sdn Bhd v Tan Sri Datuk Sri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178 (refd)
Perwira Habib Bank Malaysia Bhd v Hong Huat Holdings Sdn Bhd & Ors [1992] 2 MLJ 160 (refd)
Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan, Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Reichel v Magrath (1889) 14 App Cas 665 (refd)
Sarjit Singh Khaira v Government of the State of Sarawak & Anor [1990] 2 MLJ 251 (refd)
Siskina v Distos Compania Naviera SA [1979] AC 210 (refd)
Societe Des Etains De Bayas Tudjuh v Who Heng Mining Kongsi [1978] 2 MLJ 267 (refd)
State Public Service commission, Sarawak v Sarjit Singh Khaira [2000] 4 MLJ 353 (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor and another appeal [1998] 3 CLJ 85 (refd)
Sungai Wangi Estate v UNI [1975] 1 MLJ 136 (refd)
Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226 (refd)
Syed Mahadzir bin Syed Abdullah v Ketua Polis Negara & Anor [1994] 3 MLJ 391 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479 (refd)
Utusan Melayu (Malaysia) Bhd & Anor v Chan Tse Yuen [1989] 1 MLJ 185 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217 (refd)
Whelan v Waitaki Meat Ltd [1991] NZLR 71 (refd)

Legislation referred to

Contracts Act 1950 s 63
Employees Provident Fund Act 1951 (Revised 1982)
Federal Constitution arts 5(1), 8(1)
Industrial Relations Act s 20
Penang Port Commission Act 1995 (Act 140) (Revised 1974) ss 5, 14, 15, 17, 18, 24
Rules of the High Court 1980 O 14, O 20 r 11, O 29 r 1

S Kanawagi representing himself as plaintiff.
Raja Aziz Addruse (*Chew Eng Keat* with him) (*Lim Huck Aik & Co*) for the defendant.

Faiza Tamby Chik J. : To fully appreciate the background of this case, it is necessary for me to set it out. The Penang Port Commission ('PPC') is a public authority created by the PPC Act 1995 (Act 140) (Revised 1974) ('the Act'). The commission consists of the chairman, the general manager and between five to nine commission members (s 5 of the Act). The commission is vested with powers, inter alia, to appoint and employ such officers and servants (ss 24 and 18 of the Act) and make such regulations of service (s 15 of the Act). As the PPC at the material time employed more than 3,000 workers, the burden of attending to the employment of all officers and servants of the PPC was heavy on the commission. In practice, the commission only directly attends to the employment and disciplinary matters of division 1 and 2 officers and delegates the employment and disciplinary matters of division 3 and 4 workers to the management. The management comprises the general manager, the principal executive officer of the commission (s 17), heads of department and the personnel manager. In exercising the powers delegated by the commission to the management over the employee workers in divisions 3 and 4, it was a convention in the PPC that the head of department selects the workers, and the personnel manager attends to the documentation. The point to be noted here is that division 1 and 2 appointments and/or promotions and disciplinary matters are decided by the commission, whereas the appointments and/or promotions and disciplinary matters in relation to divisions 3 and 4 are undertaken by the management under delegated powers.

Pursuant to the abovesaid PPC arrangement, the plaintiff was employed as a mobile clerk, a division 3 post, in the Traffic Department with effect from 1 May 1975. He was interviewed by the traffic manager and the appointment letter came from the personnel manager. In appointing the plaintiff, the management was exercising the powers under a delegation from the commission. On being appointed as a mobile clerk, there came into being a contract of service between the plaintiff and the PPC. It is trite law in Malaysia that the contract is governed by the Malaysian Contracts Act 1950. Since the PPC is a statutory body and employs its employees under statutory power, the contract of employment entered between PPC and its employees was of a special kind and which acquired a special status. Thereafter, the employee's rights and obligations are no longer determined by consent of both parties, but by the statute or administrative rules made by the statutory body. This law is the same for government employees, see *Government of Malaysia v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222. Further, these statutorily created posts are permanent and pensionable after the probationary period of three years. The Employees' Provident Fund Act 1951 (Revised 1982), does not apply to such employees. Further, under this contract, the PPC employees and his family were entitled to free medical treatment and other benefits accorded to government servants, like car loans and housing loans at a subsidised interest rate. The plaintiff was confirmed as a mobile clerk on 1 May 1978 and thereby became a permanent and pensionable employee, but pension was only to commence after ten years of service as per the PPC regulations. It is the submission of the plaintiff that on joining the PPC, he wanted to enhance his career and

worked towards acquiring a professional qualification in transport and which was relevant to his employers, the PPC. This relevant qualification was to become a corporate member of the Chartered Institute of Transport, London ('CIT'). The CIT examinations comprises a four part examination. A pass in the Part I & II examinations led to the graduateship of the CIT, and which qualification is recognized as a diploma. A pass in Parts III & IV led to the final examination, enabling the member to become a corporate member of the CIT, and which membership is recognized as a professional qualification equivalent to an honours degree. The public service commission ('PSC') and the PPC recognises the CIT graduateship as a diploma and the final examination as a professional qualification equivalent to an honours degree. The plaintiff passed all the four parts of the CIT examinations by the end of 1975. At this material time, the requirement in the Bahasa Kebangsaan subject was not a requisite in the PPC. The most junior of the managerial posts in the PPC was the post of traffic supervisor ('TS') and its entry qualification was the graduateship examination of the CIT.

When the Harun Commission Report ('HCR') was ready in 1975, all the public authorities in Malaysia including the PPC, adopted and implemented the HCR with effect from 1 January 1970, and thereafter the terms and conditions of HCR became the service regulations of the PPC under the PPC Act ss 14, 15 and 18. As the current employees in the PPC, including the plaintiff, already had a subsisting contract of service with the PPC, in order for the PPC to replace the subsisting terms and conditions of the subsisting agreement with the terms and conditions of HCR, the PPC made an option in law, an offer to vary the subsisting contract of service with the HCR. This, the PPC did by adopting and incorporating the HCR as their Service Circular No 1 of 1975 dated 15 January 1975 ('SC No 1 of 1975'). Pursuant to the abovesaid, the PPC made an option which the plaintiff accepted. It is observed that this option was only in terms of the plaintiff's career in the PPC as a mobile clerk. The implication of his opting into the HCR was that the previous terms and conditions of his employment contract as a mobile clerk was extinguished and replaced by the terms and conditions found in SC No 1 of 1975, or otherwise in law there was substitution of his previous terms and conditions with a fresh set of terms and conditions pursuant to s 63 of the Contracts Act 1950 ('the CA'). It also follows that since the PPC had adopted the HCR as their scheme of employment vide SC No 1 of 1975, the HCR scheme was applicable for all fresh recruits (*Government of Malaysia v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222).

It is necessary to consider briefly SC No 1 of 1975. SC No 1 of 1975 generally is as follows:

Salary group	Direct entry qualification
A	University degree or professional qualification
B	Diploma

C School certificate

D Other qualifications which are considered lower than the school certificate.

For the purposes of this case, it is important to know the meaning of the words 'appointment' (HCR cl 32), the word 'promotion' (HCR cl 34) and the terms 'charge allowance' (HCR cl 73). The meaning of 'appointment' pursuant to cl 32 of SC No 1 of 1975 simply means the recruitment of a new employee or when a serving employee is appointed from a lower salary group to a higher salary group, eg say a clerk in salary group C is appointed as a TS in group B and which takes effect by appointment by transfer of service without loss of past service. The meaning of 'promotion' pursuant to cl 34 of SC No l of 1975 means moving up the ladder in the same salary group. Each group has three grades, ie timescale, special grade and superscale and upward movement of the grades is called promotion, ie a timescale clerk being moved up to the special group. The meaning of 'charge allowance' pursuant to cl 73 of SC No l of 1975 is an allowance given to a worker who in addition to his own work does another person's work for a continuous period of 28 days and more.

The PPC advertised for the post of TS in the STAR newspaper on 30 March 1975. This advertisement described this post as a B 13.4 post, a classification pursuant to the HCR. The required qualification was: (a) a CIT graduateship; (b) pass in Bahasa Malaysia, and all the other terms and conditions were covered by HCR (*Government of Malaysia v Rosalind Oh Lee Pek Inn*). It is noted that the requirement for a pass in Bahasa Malaysia at the SPM Examination was not a requirement pursuant to the HCR, but something additional required by the PPC and therefore when talking in terms of HCR, a pass in Bahasa Malaysia at the SPM examination is irrelevant. The plaintiff applied for the TS post and was called for an interview on 21 July 1975 and was interviewed by the PPC chairman and the commission members in exercising its powers pursuant to s 14 of the PPC Act on 21 July 1975. The plaintiff was successful in his interview and was appointed as a TS.

Therefore, applying the HCR as the governing scheme of the PPC, the plaintiff's appointment by the chairman was within cl 32 of the HCR and followed by the salary payable was as per the HCR scheme's salary grade B 13.4 and also as advertised. The point to be noted here is that in law, it was the interview in which the chairman in exercising his powers under ss 14, 15 and 18 of the PPC Act and in accepting the plaintiff's offer, ie his application, and in appointing him as a TS, that gave rise to a contract of employment which pursuant to cl 33 of SC No 1 of 1975 was an appointment. The plaintiff received an appointment letter dated 26 July 1975 ('appointment letter') signed by En Azmi bin Othman ('En Azmi'), the Personnel Manager of PPC. The appointment letter reads as follows:

SURUHANJAYA PELABUHAN
PULAU PINANG
PETI SURAT POS 143
PULAU PINANG

PENANG PORT COMMISSION
PO BOX 143
PENANG

Ref: RP 102898 26 Julai 1975

Sdr S Kanawagi,
Kerani Am,
Jabatan Trafik.

Adalah saya merujuk kepada permohonan saudara untuk menjawat jawatan penyelia trafik dan temuduga di hadapan jawatankuasa perjawatan yang diadakan tempoh hari.

Seperti yang termaklum, saudara tidak mempunyai kelulusan dalam Bahasa Malaysia seperti yang disyaratkan, dan ini bermakna saudara belum lagi mempunyai syarat kelayakan yang cukup untuk dilantik sebagai penyelia trafik sepenuhnya. Walau bagaimanapun, sementara menantikan keputusaan peperiksaan Bahasa Malaysia di peringkat SPM/MCE, sukacita dimaklumkan bahawa suruhanjaya telah meluluskan supaya saudara diberi peluang menjalankan tugas-tugas jawatan penyelia trafik, yang dibawah Skim Harun tidak merupakan jawatan kenaikan pangkat yang biasa seorang kerani, di samping menjalankan tugas-tugas saudara sendiri mulai dari 1 Ogos 1975. Semasa saudara menjalankan tugas jawatan penyelia trafik itu, saudara adalah layak menerima elaun tanggungan kerja mengikut perenggan 74(b) Pekeliling Perkhidmatan Bil 1/75.

Saudara hendaklah memberitahu Jabatan Kakitangan sebaik sahaja keputusan peperiksaan yang ditunggu itu diterima supaya dapat dipertimbangkan untuk melantik saudara sebagai seorang penyelia trafik sepenuhnya.

t.t.

(Azmi bin Othman)
Pengurus Kakitangan,
Suruhanjaya Pelabuhan Pulau Pinang.

It will be noted that the appointment letter was not in the terms of the selection committee's decision, and was radically different from the decision taken by the selection committee on 21 July 1975 and was further couched in a language vague and alien to the terms and conditions of HCR. I am of the view that once appointed, the plaintiff's appointment fell within HCR cl 32, and if he did not possess a pass in Bahasa Malaysia, this fact only affected his confirmation to the post appointed pursuant to cl 32, which meant that he could not have applied for promotions.

The plaintiff started work as a TS on 1 August 1975. The normal training for a newly recruited TS was two months, but he being an in-service staff was given a two weeks shortened training period and commenced full time TS work by mid August, 1975. It should be borne in mind that this action by the PPC shows the consequent conduct of the PPC emanating from the commission's appointing the plaintiff as a TS, or otherwise there was no way that he, a mobile clerk in a category C group, could have moved on to a category B job. It is observed that he started work as a TS on 1 August 1975. Thereafter, he ceased doing his previous work as a mobile clerk. Therefore, the question of giving a charge allowance pursuant to cl 73 of SC No 1975 did not arise in his case. The appointment letter stated that

he was to be given a 'charge allowance'. The definition of 'charge allowance' was given in HCR or SC No 1 of 1975 cl 74. As per SC No 1 of 1975 and SC No 6 of a charge allowance (cl 74) is only a category of an allowance and has nothing to do with appointment (cl 33) and/or a promotion (cl 34). Whereas, for 'appointment' (cl 32) or 'promotion' (cl 34) results in a binding agreement for which there has to be an offer, acceptance, consideration and *consensus ad idem*. But a 'charge allowance' (cl 74) is given to an employee who does additional work on top of his job for a continuous period of not less than 28 days on instructions from the management. In law, this instruction, unlike an appointment and/or a promotion, does not result from a contract. This instruction from the management is exercised by the management under the powers of management prerogative and which is not expressed in the PPC Act like the specific provision given to the commission for the appointment of officers and servants by ss 14, 15 and 18 of the PPC Act, but this management prerogative is only implied. As an illustration, say in an office where ten clerks are working and one clerk goes on a three month course. That absence of the clerk who is on three months leave is not a vacancy that can be filled by the management for that clerk is returning to work. As a temporary measure, the management under its management prerogative instructs unilaterally one of the other clerks to perform the absent clerk's job, and in addition to his own job and for this additional work done, the management awards the clerk with a charge allowance. Hence, it can be said that appointments and promotions are consequent to a binding contract being brought into effect, whereas for the purposes of an employee receiving charge allowance, there was no new contract formed. Further, for category A & B jobs, the person exercising the power, promotion or appointment is the commission. For category C & D jobs, it is the management who does the appointment or promotion. For the purposes of charge allowance, it is the head of that section or head of department who gives the instruction, be it Category A, B, C or D employees. In the instant case, it is the commission that appointed the plaintiff, pursuant to an advertisement and interview and therefore, the question of 'charge allowance', consequent to the commission's interview did not arise. Therefore, the instructions given by the management to the employee to perform the additional work in order to be paid the charge allowance is unilateral and given under the prerogative of the management and which instruction the employee cannot refuse, for refusal can amount to insubordination which constitutes a serious misconduct. In comparison, in the case of 'appointments' and 'promotions', the employee can reject such an appointment and/or promotion even after having accepted that appointment or promotion without any repercussions from the management. It is also observed that an instruction given to an employee to carry out the additional work which would attract a 'charge allowance' is given by the head of the section or head of the department and not by the personnel manager, for such instructions only emanate as part of the day to day affair of the running of the PPC. The role of the personnel manager is only to arrange for the payment of this 'charge allowance'. The PPC had advertised for a TS post (a group B post under SC No 1 of 1975, cl 25) and

the plaintiff had applied for that post of TS, and he was selected by the commission at the interview. A binding agreement came into being between the PPC and the plaintiff at the time of the interview and which contract was documented by the personnel manager's letter dated 26 July 1975. This agreement was executed by PPC giving the plaintiff training for the post of TS and putting him in a full time TS post with effect from 1 August 1975. Since he was a serving employee under an agreement with the PPC, the new agreement was in law a substitution of the old agreement pursuant to s 63 of the CA, and what the HCR or SC No 1 of 1975 defines as appointment by transfer from one group to another group in cl 32. The plaintiff passed his Bahasa Kebangsaan in the July 1976 SPM examination and he duly informed PPC of it. Hence the plaintiff had fulfilled the condition given to him by the commission and it was up to the PPC to confirm his appointment. Between 1 August 1975 and end of 1981, for a span of over six years, the plaintiff worked as a TS without any confirmation from the PPC. Further, he did not do any other job in addition to the TS job in order to attract a 'charge allowance' pusuant to the HCR. It is the submission of the plaintiff that during that period, he had taken up his grievances and complained to many persons at all levels up to the minister in charge of PPC, the minister of transport and the minister of human resources, but in vain. Sometime in 1981, the assistant personnel manager of PPC lodged a report with the PPC Security Department complaining that the plaintiff had committed an offence and the PPC Security Department personnel purportedly investigated the report, framed a charge and had the plaintiff charged in the court. Citing the above grounds, the PPC on 8 September 1981 interdicted the plaintiff. Commencing from his interdiction, the PPC paid him a half monthly salary. This meant that if he was reinstated, he would have been entitled to the arrears of his unpaid half salary from 8 September 1981. It is noted that during this period of interdiction, the plaintiff enrolled with the university in UK to study law and left for UK on 11 January 1982. At about the same time PPC stopped payment of the plaintiff's salary into his bank account with effect from 1 December 1982 and instructed him to call personally at the PPC office to collect his salary. Since he was overseas, this meant that if he was reinstated he would have be entitled to the arrears of his full salaries from 1 December 1982 plus monthly half salary from 8 September 1981. The court heard the charge against the plaintiff and at the end of the prosecution case, the prosecution found that there was no case to answer and discharged and acquitted him on 29 February 1984. By the court discharging and acquitting him, the PPC was required to recall the plaintiff to work and pay him all his arrears of salary. This the PPC did not do. By the end of 1984, the plaintiff had completed his law and certificate of legal practice. Sometimes at the beginning of 1985, the plaintiff informed the PPC that he would take them to court if they refused to recall him. Eventually by a letter dated 18 February 1985, the PPC asked him to report to work on 1 March 1985 but to the post of a clerk, a post he last held on 31 July 1975. The said letter recalling him reads as follows:

SURUHANJAYA PELABUHAN PULAU PINANG
PETI SURAT 143
PULAU PINANG
(BERDAFTAR)

Tarikh: 18 Februari 1985

Saudara Kanawagi a/l Seperumaniam
71 Lorong Maarof,
Bangsar,
Kuala Lumpur

Saudara,
Kembali Bertugas Sebagai Kerani Am

Saya diarah untuk memaklumkan bahawa Pendaftar, Mahkamah Sesyen, Pulau Pinang telah mengesahkan bahawa Yang Arif Timbalan Pendakwaraya tidak akan meneruskan rayuan ke atas kes saudara.
Oleh yang demikian, saudara diminta kembali bertugas dengan suruhanjaya ini sebagai kerani am pada 1 Mac 1985.
Sila lapurkan diri kepada saya jam 8am pada 1 Mac 1985.

'KEPIMPINAN MELALUI TELADAN
KEKESANAN DAN MENINGGIKAN HASIL KERJA'

tt
(Abdullah bin Haji Salleh)
Pengurus Kakitangan
Suruhanjaya Pelabuhan Pulau Pinang

By a letter dated 28 February 1985, the plaintiff wrote to the PPC informing the PPC that they should recall him to the post of TS and not to his previous rank of clerk, a group C post, and that he considered the PPC's action as constructive dismissal and will not report back as a clerk.

The said letter reads as follows:

Kanawagi a/l Seperumaniam
1259, Jalan Harapan
Bukit Mertajam
Seberang Perai.

28 February 1985.

The General Manager, REGISTERED
Penang Port Commission
Penang

Tuan,

I am in receipt of two (2) of your letters dated 18 February 1985 concurrently.

Please be informed that I am referring this matter to the Chairman of the Penang Port Commission.

Please also take note that I will not report back to duty on 1 March 1985 as a general clerk because the post which I am entitled to is that of a traffic supervisor and not a clerk.

Also, kindly let me have your explanations as to why the Penang Port Commission did not reply the letters from my lawyer M/s Darshan Singh & Co dated 11 August 1981.

Also let me know why my letters addressed to the personnel manager dated 4 and 24 February, 15 March and 2 April 1984 were not replied.

Further, kindly also let me know as to which regulation of the Penang Port Commission entitles you to interdict me or if a decision was taken, who and by whom.

Thank you.

Yours faithfully,

tt
S Kanawagi.
cc Chairman, Penang Port Commission

The PPC then issued a show cause letter dated 6 March 1985 and sacked the plaintiff on 7 May 1985 with effect from 1 March 1985. The said letter reads as follows:

SURUHANJAYA PELABUHAN PULAU PINANG
PETI SURAT 143
PULAU PINANG
Tarikh: 6hb Mac 1985

(AR REGISTERED)

Saudara Kanawagi a/l Seperumaniam
1259, Jalan Harapan,
Bukit Mertajam.

Saya diarah untuk merujuk kepada surat berdaftar tuan yang dialamatkan kepada Pengurus Besar, Suruhanjaya Pelabuhan Pulau Pinang bertarikh 28 Februari 1985.

Oleh kerana jawatan hakiki tuan di Suruhanjaya Pelabuhan Pulau Pinang ialah kerani am, maka tuan adalah dikehendaki kembali bertugas di dalam jawatan itu. Alasan yang tuan berikan supaya tuan kembali bertugas sebagai penyelia trafik tingkatan biasa tidak dapat diterima.

Tuan diminta memberi penjelasan dalam tempoh 14 hari dari tarikh tuan menerima surat ini, mengapa tindakan tatatertib yang boleh menyebabkan tuan dibuang kerja tidak harus diambil terhadap tuan kerana tidak hadir untuk bertugas sejak 1 Mac 1985.

Mengenai pertanyaan-pertanyaan yang tuan bangkitkan di perenggan 4, 5 dan 6 surat tuan itu, sila maklum bahawa pihak pengurusan suruhanjaya ini akan memberi jawapan secara berasingan dalam sedikit masa lagi.

KEPIMPINAN MELALUI TELADAN
KEKESANAN DAN MENINGGIKAN HASIL KERJA

t.t.
(Abdullah bin Haji Salleh)
Pengurus Kakitangan
Suruhanjaya Pelabuhan Pulau Pinang

It is under the abovesaid circumstances that the plaintiff filed an action against PPC vide Kuala Lumpur High Court Civil Suit No S1–22–208–87 ('the main case').

On 14 February 1994, the plaintiff filed an O 14 of the RHC summary judgment application. The said application had three main prayers, namely:

(1) For a declaration that the defendant's disciplinary board action in terminating the plaintiff's services by a letter dated 7 May 1987 was ultra vires the Penang Port Commission Act, and was therefore null and void was and invalid ('prayer one');

(2) for a declaration that the plaintiff, in having obtained a pass at the Bahasa Malaysia subject at the Sijil Pelajaran Malaysia examination 1976 has satisfied the defendant's condition stipulated in their letter dated 26 July 1975 to be confirmed as a traffic supervisor in the defendant's services ('prayer two');

(3) for an order that damages sustained by the plaintiff be assessed by the deputy registrar and be paid by the defendant to the plaintiff together with interest at 8%pa till the date of realization ('prayer three').

On 18 July 1994, Anuar J (as he then was) gave order in terms for prayers 1 and 3. There was no appeal filed on these orders of the High Court. The PPC later, out of time, filed an application in the Court of Appeal, Civil Application No W–08–151–94 for leave to appeal out of time. However this application was dismissed with costs on 21 November 1994. On 20 October 1994, Anuar J (as he then was) heard prayer two and granted order in terms. On 20 October 1994, the PPC lodged an appeal against this order given by the judge on 20 October 1994, vide Court of Appeal Civil Appeal No W–02–252–94 ('first appeal in the Court of Appeal'). On 23 October 1994, the deputy registrar conducted a trial on the assessment of damages. On 24 October 1994, the deputy registrar continued the trial on the assessment of damages and awarded a sum of RM2,274,151.42. On 28 October 1994, PPC lodged an appeal to the judge in chambers (encl 62) against the registrar's award. The plaintiff levied execution by way of garnishment proceedings. The plaintiff had obtained the garnishment order nisi against the garnishee, Bank Bumiputra (M) Bhd. On 7 December 1994, the deputy registrar made the garnishee order absolute. The PPC appealed against that order absolute.

On 19 December 1994, the PPC had applied to the judge (encl 98) to stay the judge's decision given in relation to prayer two on 20 October 1994 and the award of the deputy registrar's award given on 24 October 1994. This application was dismissed by the judge on the same day. On 19 December 1994, the PPC lodged an appeal to the Court of Appeal against the decision of Anuar J given in respect of encl 98. This appeal in the Court of Appeal was Civil Appeal No W–03–16–1994 ('the second appeal in the Court of Appeal'). On 19 December 1994, the garnishee bank paid out the garnished sum that was levied upon the garnishee bank. On 20 December 1994 the PPC, in the second appeal in the Court of Appeal, obtained an exparte stay on the execution of the garnishee order from the president. On 3 January 1995, the Court of Appeal heard this application. The court was informed that the garnishee paid out the sum and hence a stay was useless. Counsel for the PPC, Raja Aziz then applied orally for and

obtained an injunction against the plaintiff from disposing the fund that had been deposited with the bank ('the first injunction from the Court of Appeal'). On 13 June 1995, the PPC then made a second application in the second appeal that the plaintiff deposit the fixed deposit receipt for the fund with the court. On 2 August 1995, this second application was heard by the Court of Appeal and the court made the order ('second injunction of the Court of Appeal'). After this, the plaintiff had made an application to the Federal Court for leave to appeal from the decision of the second order of the Court of Appeal. On 7 August 1995, the Federal Court dismissed the application. On 9 November 1995, the plaintiff went back to the Court of Appeal and made an application in the second appeal to set aside the first and second injunction orders on the ground that the Court of Appeal had no original jurisdiction to grant an injunction, for original jurisdiction is only given to the High Court pursuant to s 43 of the Courts of Judicature Act 1964 ('the CJA'). On 6 September 1996, the Court of Appeal heard this application and allowed this application to set aside the first and second injunctions of the Court of Appeal ('third order of the Court of Appeal'). On 5 October 1996, the PPC filed a motion in the Federal Court vide Federal Court, Civil Application No 08–80–1996 (W) for leave to appeal against the third order. On 26 February 1997, before the PPC's motion for leave to appeal was heard by the Federal Court, the first and second appeals were scheduled to be heard. The Court of Appeal heard the first appeal and allowed the first appeal. The Court of Appeal did not hear the second appeal but adjourned it to be heard the following day. On the next day, instead of hearing the second appeal, the Court of Appeal made an additional order in the first appeal setting aside the registrar's award. Though there was no appeal against the registrar's award before the Court of Appeal, the Court of Appeal claimed to make that order setting aside the registrar's award as a 'consequential' order ('fourth order of the Court of Appeal'). With this, the appeal came to an end. The Court of Appeal made no order on the second appeal. With this, the appeal came to an end. It is observed, however, that the written judgment of the Court of Appeal in the first appeal delivered on 23 June 1998 does not reflect or show the consequential order. There is an application before the deputy registrar to set aside the extracted order of the Court of Appeal dated 26 February 1997, and which order purports to set aside the award of deputy registrar dated 24 October 1994. On 20 March 1997, the plaintiff lodged a motion in the Federal Court for leave to appeal against the fourth order vide Civil Application No 08–18–97 (W). On 13 March 2000, the Federal Court, on an oral application by PPC's counsel, granted an injunction restraining the plaintiff from disposing of the fund. On 29 March 2000, the Federal Court on an oral application by the PPC's counsel granted an injunction ordering the plaintiff to deposit the judgment sum of RM2,274,151.42 into the court within one month. On 25 April 2000, the Federal Court varied the injunction order dated 29 March 2000 by expanding the period for the above payment from one month to three months. The plaintiff has not paid in the money and the main appeal is still pending before the Federal Court.

Therefore, it can be seen that the originating summons before this court today is an originating summons filed by the plaintiff seeking consequential reliefs to enable him to retain his employment and continue his eligibility to be paid his salaries and all other emoluments and allowances from the date of the order of the Kuala Lumpur High Court, Civil Suit No S1-22-208-87 ('the main case') dated 18 July 1994 when the court granted a declaratory order declaring the plaintiff's dismissal by the defendant as null and void and invalid. The defendant, a statutory body refuses to give effect to the declaratory order of the High Court by refusing to reinstate the plaintiff, resulting in the plaintiff applying to this court by this action for consequential orders to be reinstated and be paid all his salaries and all emoluments and allowances. The plaintiff's originating summons is supported by the affidavit affirmed by the plaintiff on 11 January 2000, to which the defendant had filed a reply affirmed on 27 March 2000. Under normal circumstances, I would have decided this case summarily but in light of the acrimonious relationship between the parties in this litigation and which litigation had seen multiple appeals and applications in all the three courts namely, the High Court, the Court of Appeal and the Federal Court, and the exceptional opposition put up by the defendant, I reserved judgment, asked for further particulars from the parties, especially in relation to the chronology of events, and took time to study this case in detail.

As this originating summons is for consequential remedies arising from prayer one of the summary judgment, I will confine myself to prayer one of the summary judgment, and not deal with other prayers. The defendant has conceded that they did not appeal against prayer one. That being so, the dispute in prayer one between the plaintiff and defendant is final, the plaintiff's cause of action forming the subject matter of prayer one having merged into the order of the court dated 18 July 1994. That order now operates as res judicata and closes the door to the defendant to challenge this decision in any manner whatsoever, including attacking that decision in the same proceedings subsequently or in any new or collateral proceedings between the same parties or their privies. Gopal Sri Ram JCA in the Court of Appeal case of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 affirmed this point of law and again reaffirmed this law in the case of *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 at p 490 quoting Sharma J in the case of *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74:

> A decision given by a Court at one stage on a particular matter on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit (see *Peareth v Marriot* (1883) 22 Ch D 182, *Hook v Administrator-General of Bengal & Ors* 481A 187 and *In the Matter of Trusts of the Will of Tan Tye (deceased) Yap Liang Neo v Tan Yew Ghee & Anor* [1936] MLJ 141 at pp 147–151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v Aruna Chalaayya* (1931) 58 IA 381).

A And in *Tenaga Nasional Bhd v Prorak Sdn Bhd* [2000] 1 MLJ 479 at p 492 Gopal Sri Ram JCA said:

> Thereafter it is not open to the court countenance that particular cause or matter because it had already finally been disposed off.

B As long as this court is concerned, the decision given by Anuar J (as he then was) on 18 July 1994 is final. Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App Cas 665 at p 668 said:

> …. I think it would be scandal to the administration of justice if, the same question having been disposed off by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.

C This would mean that the order given by Anuar J (as he then was) on 18 July 1994 stands, and if that order stands, the plaintiff can give effect to it and this is what this originating summons is about.

D The plaintiff's case is quite straightforward in that he claims that pursuant to prayer one of his summary judgment order against which there was no appeal, he is entitled to be reinstated and relied on the Federal Court case of *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 and the Federal Court case of *Mohd bin Ahmad v Yang Di-Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361. In both these cases, the court categorically stated that where in a case a public

E servant is dismissed by the employer and the servant obtains a declaratory order from the court that the dismissal is null and void, the servant's services are not terminated and continues and is entitled for reinstatement and to be paid his arrears of salary and other emoluments.

F The plaintiff's complaint is that even though the court had given a declaration that his dismissal by the defendant in 1985 was null and void and invalid and which order requires the defendant to reinstate the plaintiff, the defendant refuses to reinstate the plaintiff and by that refusal the plaintiff is helpless and has come to this court for redress to compel the defendant to reinstate the plaintiff consequent to the order made by the court on 18 July 1994.

G

The defendant's defence

The defendant strongly resisted the plaintiff's claim and relied upon grounds which can be generalized as follows:

H (1) the plaintiff is reopening and should not be permitted as it will result in multiplicity of proceedings applying the law of res judicata and issue of estoppel;

(2) the plaintiff's action is barred by limitation;

(3) the plaintiff, having received damages, has elected or alternatively is estopped by approbation and reprobation in seeking reinstatement.

I

It would be noted that the defendant is not disputing any facts in issue but is only raising points of law to resist the plaintiff's claim.

Comment on earlier proceedings

On the onset, I wish to comment and I can do no better than to repeat what Gopal Sri Ram JCA writing the judgment of the Court of Appeal said in the case of *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 at p 483:

> This case demonstrates the terrible harm that may be visited upon the litigant's head because of his solicitor's mistake. We hasten to add that the solicitor concerned is no longer on record in the proceedings before us.
>
> Whenever possible, where there is no risk of sacrifice of principle in the name of justice or at the altar of convenience, we do our best to ensure that a lay client does not suffer because of the mistake of his legal advisers. We do so in the interest of justice. When we act, we always bear in mind what Lord Denning said in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119 at p 121:
>
> > 'We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of evidence, in which case we can at best order a new trial.'
>
> We have intervened where counsel makes an erroneous admission of law. See, *Lee Hock Ning v Government of Malaysia* [1972] 2 MLJ 12. But it is not possible where our decision would be in defiance of established principle or where an injustice visited upon the other side. See *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705.

It is my observation that the defendant's case throughout was punctured with mistake for whatever reasons, but nevertheless having disastrous effects on the defendant's case. If the defendant did not want to reinstate the plaintiff then they should have appealed against the decision of Anuar J (as he then was) given on 18 July 1994, and not choose this forum to lodge an attack on that decision which is now final and can be given effect. Further to compound their predicament, the defendant in the assessment of damages trial did not produce any witnesses and virtually surrendered to the plaintiff. Yet the defendant did not appeal against the oral application for stay of execution made by the deputy registrar after the judge, no further application for stay can be made to the same court as the matter is res judicata (*Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74). Lastly, after the garnishee had paid out the garnished sums, they did not apply for an injunction at the High Court as mandated by s 43 of the CJA but instead applied for the same at the Court of Appeal. The Court of Appeal initially gave the injunctions on 3 January 1995 and 2 August 1995, but subsequently on 6 September 1996 set aside these two injunctions.

However, after the Court of Appeal's decision on 6 June 1996, the defendant rushed back to the High Court and complying to s 43 of the CJA, got an ex parte injunction from Mohd Noor J restraining the plaintiff from dissipating the award. The defendant had further applied for an inter parte injunction. The plaintiff applied to set aside this ex parte order and succeeded on 8 October 1996. Order 29 r l of the Rules of the High Court 1980 ('the RHC') does not permit a defendant to apply ex parte, only a

plaintiff can apply ex parte (*Permodalan MBf Sdn Bhd v Tan Sri Datuk Sri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178). Further, the plaintiff also succeeded in dismissing the defendant's inter parte application for the injunction. Again, the defendant did not appeal against those two orders. It is also to be noted that a court cannot grant an injunction to prevent the enforcement of a judgment of a court of competent jurisdiction (see the Supreme Court decision of *Perwira Habib Bank Malaysia Bhd v Hong Huat Holdings Sdn Bhd & Ors* [1992] 2 MLJ 160). There is a difference between a stay and an injunction (*Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan, Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 and *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor and another appeal* [1998] 3 CLJ 85). Whereas a stay is granted to stop the judgment creditor from executing his judgment which is at the tail end of the litigation and is given on special circumstances, an interlocutory injunction is granted at the beginning of a litigation to preserve the subject matter of the trial, and here, for an applicant to get one he must succeed in the test pronounced by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

The Supreme Court in *Utusan Melayu (Malaysia) Bhd & Anor v Chan Tse Yuen* [1989] 1 MLJ 185 said:

> … On the basis of *American Cyanamid Co v Ethicon Ltd* it is a well established principle that an interlocutory injunction is a discretionary relief. It is a form of judicial relief whereby the court orders a party to the proceedings either to refrain from doing specific acts or to do certain specified acts. It may be granted if it appears to the court to be just or convenient so to do in order to safeguard the position of one of the parties until his rights can finally be determined at the trial of the action. So long as there is a serious question to be tried, that is to say, so long as the plaintiff's claim is not frivolous or vexatious, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

And further it is well established in law that an interlocutory injunction is ancillary to a cause of action and therefore it is only a party who has a cause of action who can apply for an interlocutory injunction (see *Siskina v Distos Compania Naviera SA* [1979] AC 210). This law has been followed in Malaysia, see *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423 at p 424 where Zakaria Yatim J (as he then was) said:

> … One of the essential requirements for granting an interlocutory injunction, as laid down in *American Cyanamid Co v Ethicon Ltd* at p 510, is that the court must be satisfied that there is a serious question to be tried. Lord Diplock in his speech in the *American Cyanamid* case envisaged a trial of the action. In *Cayne v Global Natural Resources*, May LJ said at p 237:
>
> > '… In the *American Cyanamid* case [1975] 1 All ER 504 there was a serious question to be tried between the parties, which could only be resolved by a trial. It was clearly contemplated that there would be a trial. The application for the interlocutory injunction was merely a holding operation pending that trial … .'
>
> Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on

whether there is a cause of action. In *Siskina v Distos Compania Naviera SA* Lord Diplock, in his speech at p 256 said:

> 'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles, which may or may not include a final injunction.'

In the present case, since there is no cause of action, there is no serious question to be tried.

The present defendant who has not filed a counterclaim cannot show a cause of action in order to comply to the first test in the *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 that he has a serious question. Such an application by the defendant is bound to fail. However, despite the trail of mistakes committed by the defendant in the conduct of their case, and in order to do justice to this case without any 'defiance of established principles or where an injustice would visit upon the other side', I would take the defendant's submissions one by one.

The defendant's first ground

The defendant firstly submits that the plaintiff's present application is to reopen the original case, which should not be permitted as it will result in multiplicity of proceedings, applying the law of res judicata and the issue of estoppel.

In my mind, this is not an application by the plaintiff to reopen the original case and vary, alter or amend the order made by the court on 18 July 1994. This present action arises as a result of the defendant's obstinate disobedience to give effect to that order made on 18 July 1994 that the plaintiff is compelled to seek consequential orders to give effect to it. Therefore, this case is not to reopen and/or vary, alter or amend the order made by the court on 18 July 1994 to attract the rule of res judicata and corollary to it, the rule of issue of estoppel and *functus officio*. And neither is the plaintiff's application made under the slip rule which is possible under O 20 r 11 of the RHC. The giving of consequential orders by the court is not a rehearing or reopening the case (see *Fritz v Hobson* (1880) 14 Ch D 542, at p 561). In this case, Fry J at p 561 said:

> In the next place, it is said that I have no jurisdiction to amend the judgment or to grant this application, because the court has no jurisdiction to rehear an action. In my opinion I have jurisdiction to grant this application. In the first place, it is to be borne in mind that an order was made, although it was not drawn up, directing the motion in question to stand until the trial. According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said) all orders of the court carry with them *in gremio* liberty to apply to the court.

A The above ratio has been consistently followed by our courts (see *Societe Des Etains De Bayas Tudjuh v Who Heng Mining Kongsi* [1978] 2 MLJ 267 at p 270, *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226 at p 227, *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 119 at p 120). The above pronouncements of law are too well entrenched and therefore the defendant's argument that the plaintiff is B reopening his case fails.

Ground 2

From the history of this case, it can be seen that the plaintiff's present action is not a new case and is only for consequential orders to give effect to the C order dated 18 July 1994. This would mean that the plaintiff, in the present action, is not relying on any new cause of action and which fact is vital for the operation of the law of limitation. For limitation in a case of contract like the present case, time runs from the date of the breach (*Nasri v Mesah* [1971] 1 MLJ 32). The plaintiff's cause of action has already been D adjudicated and it has merged into the order of the court dated 18 July 1994. Therefore, there is no cause of action involved in this case to attract the law of limitation. This is an established principle and cannot be ignored. Therefore, the defendant's argument on limitation also fails.

Ground 3

E The defendant's last ground is that the plaintiff is approbating and reprobating, in that the plaintiff, having elected to claim damages for wrongful termination and having been awarded over RM2m cannot now seek reinstatement. As I had stated earlier that the declaration declaring the defendant's action of dismissing the plaintiff as null and void was given F pursuant to prayer two and the assessment of damages was given pursuant to prayer three and against which two prayers there was no appeal. If the defendant wanted to dispute that the plaintiff was only entitled to one remedy between prayer one and three then the defendant should have taken up that argument in the earlier trial before Anuar J (as he then was) and not at this forum, for by this time the judgment given in the form of prayer one G and prayer three is now final and indisputable by the law of res judicata. This means that the plaintiff is entitled to the benefit of both prayer one and prayer three and the authors of this situation is the defendant itself in not having appealed against the decision of the court dated 18 July 1994 and thereby allowing the order to become final. Again this is an established principle which the defendant cannot overcome.

H Senior counsel for the defendant also submitted, as an ancillary issue, that the deputy registrar was wrong in awarding RM2m under distress, anguish, anxiety, inconvenience, embarrassment and humiliation for the law does not permit such damage and relied on the case of *Addis v Gramophone Co Ltd* (1909) AC 488. Though I rule that prayer three is now I res judicata, and not before me, and should have been taken up before either the deputy registrar who made the award and/or on appeal from his decision and which was not done, for the interest of justice I have looked into this

aspect of law. It is indeed true that in *Addis v Gramophone Co Ltd,* the House of Lords took the view that a dismissed employee could not claim damages for injured feelings. The 1909 decision in *Addis v Gramophone Co Ltd* being that of the then imperial court was binding on all the colonial courts and were followed by the courts in the colonies including Malaysia. However, the decision in *Addis v Gramophone Co Ltd* did not have smooth sailing for it could not stand the test of time and was later not followed as being unsound. Lord Denning in *Heywood v Wellers* [1976] 1 All ER 300 though not making a direct attack on the ratio of *Addis v Gramophone Co Ltd* said that the ratio of *Addis v Gramophone Co Ltd* had to be reconsidered and that the proper test for damages arising out of breach of a contract would be the reasonable forseeability test pronounced in *Hedley v Baxendale* (1854) 9 Ex 341; 156 ER 145 and the court did not follow *Addis v Gramophone Co Ltd*. Not surprisingly in the case of *Cox v Phillips Industries Ltd* [1976] 1 WLR 683, a breach in employment case for claim of mental distress, the English High Court of Queens Bench division, although bound to follow the House of Lords decision of *Addis v Gramophone Co Ltd*, elected not to follow *Addis v Gramophone Co Ltd* but instead followed the Court of Appeal case of *Jarvis v Swan Tours Travel* [1973] 1 All ER 171, a holiday which turned sour case and awarded damages for mental distress. Lawson J in the *Cox v Phillips Industries Ltd* [1976] 1 WLR 683 said:

> But I can see no reason in principle why, if a situation arises which within the contemplation of the parties would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach should not be compensated in damages for that breach.

Even in New Zealand, there was a move away from *Addis v Gramophone Co Ltd* and this case is *Whelan v Waitaki Meat Ltd* [1991] NZLR 71, an employment dismissal case, where the trial judge expressly ruled that the ratio in *Addis v Gramophone Co Ltd* was unsound.

Finally, the House of Lords corrected themselves on this point in the case of *Malik v Bank of Credit and Commerce International SA* [1997] 3 WLR 95 after examining the law in relation to this issue in England as well as in the Commonwealth *Addis v Gramophone Co Ltd* was not followed. Here their Lordships ruled that *Addis v Gramophone Co Ltd* was wrongly decided. With this decision of the House of Lords it can no more be said that the ruling in *Addis v Gramophone Co Ltd* is still good law. Although a decision of the House of Lords is not binding on this court, the court can take cognizance of their judgments for justice and good sense know no national boundaries. It is to be noted that in England, the law on contract is still dependent on the common law. Whereas in Malaysia, our contract law is codified and found in the CA and therefore any disputes emanating from a contract should be resolved by applying the provisions of our CA. And where damage arises out of contracts, the governing provision is s 74 of the CA. In this aspect this is what Edgar Joseph Jr FCJ, in the case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 787 said:

The governing principles

The starting point regarding this part of the case is s 74 of the CA (Rev 1974), which is really declaratory of the common law rules enunciated in the celebrated case of *Hadley v Baxendale* (1854) 9 Ex 341 at p 354; 156 ER 145 at p 151 (see B*ank Bumiputra Malaysia Bhd v Mae Perkayuan Sdn Bhd* [1993] 2 MLJ 76 at pp 87-91).

At common law, the general principle which constitutes the starting point in the assessment of damages for breach of contract is, in the words of Parke R in *Robinson v Harman* (1843-60) All ER Rep 383 at p 385; (1848) 1 Ex 850 at p 855; 154 All ER 363 at p 365, 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'. This was cited with approval by the Court of Appeal in *Koufos v Czarnikow Ltd* [1969] 1 AC 350 at pp 414 and 420; [1967] 3 All ER 686 at pp 710 and 714; [1967] 3 WLR 1491 at pp 1527 and 1532.

But, the general principle aforesaid has been qualified and limited by *Hadley v Baxendale* where the principle enunciated are these:

> 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

Explaining the distinction between the first and the second rules in *Hadley v Baxendale*, Lord Wright said this in *Monarch Steamship Co v Karlshamns Oliefabriker* [1949] AC 196 at p 221; [1949] 1 All ER 1 at pp 12-13:

> 'The distinction there drawn (viz in *Hadley v Baxendale*) is between damages arising naturally (which means in the normal course of things) and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties: in the later event it is laid down that the special facts must be communicated by and between the parties. The distinction between these types is usually described in English law as that between general and special damages; …'

I would therefore consider the ruling in *Addis v Gramophone Co Ltd* in terms to what Gopal Sri Ram JCA in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & another appeal* [1996] 1 MLJ 481 described as 'archaic and unfair' and based on English medieval history and which is not sound and therefore not applicable to us in light of s 74 of the CA. For the reason given above the defendant also fails in its ground, ie the plaintiff had reprobated and approbated.

The law of master and servant in Malaysia

I will now proceed with the plaintiff's claim.

The law of master and servant in this country is not a straightforward and easy matter as observed by Gopal Sri Ram JCA in the case of *Hong Leong Equipment v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 where his Lordship, at p 506, stated the position of the common law in relation to the master and servant:

The position at common law

At common law, an employee who is dismissed in breach of the terms of the contract governing his employment may sue for damages for breach of contract. He may not, save in very exceptional cases obtain specific enforcement of his contract. See *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407. The remedy available to an employee at common law was described by Raja Azlan Shah J (as he then was) in *Menon v The Brooklands (Selangor) Rubber Co Ltd* [1968] 1 MLJ 15. His judgment was upheld by the then Federal Court whose decision is reported at [1968] 2 MLJ 186. But I prefer to quote from the judgment handed down at first instance. This is what Raja Azlan Shah J said (at p 16):

> 'The fact that the master has not heard the servant in his own defence is irrelevant; the criterion is whether facts emerging at the trial prove breach of contract. If the facts do not warrant summary dismissal, the master must pay damages. See *Ridge v Baldwin* [1963] 2 All ER 66 at p 71. The onus is on the defendant to prove that summary dismissal was justified: see *Savage v British India Steam Navigation Co Ltd* 46 TLR 295.'

The common law, in its dealings with workmen, is therefore both archaic and unfair. It is based upon English medieval notions of a vassal's subservience to the lord of a manor. Hence, the use of the demeaning expression 'master and servant'. It appears that, at least for the moment, little may be done to improve the position because of well entrenched principles of the common law and doctrines of equity.

In *Dato Abdullah bin Ahmad v Syarikat Permodalan Kebangsaan Bhd & Ors* [1990] 3 MLJ 505, NH Chan J (now JCA) made a valiant attempt to free our common law of its medieval shackles by awarding specific relief in what was essentially a case of wrongful dismissal. His reasoning had the merit of logic and justice. But he was reversed by the Supreme Court which preferred the traditional view. See *Dato HM Shah v Dato' Abdullah bin Ahmad* [1991] 1 MLJ 91. So the outdated principles of the common law and doctrines of equity continue to work their will in this area of the law.

It was against this background that Parliament intervened. That intervention came in the form of the Act, followed by a series of amendments made to it, including the introduction of s 20 in its present form. Since that section lies at the heart of the present appeals I shall now turn my attention to it.

Position under the Act

Section 20 of the Act provides as follows:

20 Representations on dismissals

(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

From the above, one can see that with regards to employees in the private sector, the weakness in the common law traditional view has been rectified by statutory intervention and the remedy of reinstatement is now made available by s 20 of the Industrial Relations Act. But an employee in the

public sector cannot apply for redress in the Industrial Court. But unfortunately the position of public servants, ie those employed in the government sector, statutory bodies and local authorities still seem to be 'shackled by archaic and unfair' rules of common law. However, our courts are slowly but surely updating that law to harmonize the position of employment law in the private and public sectors.

The law pertaining to public servants also took a tedious road as to the type of remedy public servants were entitled to. Initially the argument was that public servant were only entitled to the remedy of certiorari to quash the decision of the public authority in dismissing the employee. This was one argument in the case of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 28 MLJ 169, but the Privy Council held that the remedy of declaration was available to a public employee. Again, in the case of *Mahan Singh v Government of Malaysia* [1978] 2 MLJ 133 the Privy Council again upheld that declaratory relief was available to a public servant. The effect of a declaratory relief was well pronounced by Abdoolcader J (as he then was) in the case of *Sungai Wangi Estate v UNI* [1975] 1 MLJ 136 at p 140 where his Lordship said in relation to declaratory relief:

> … it does not prescribe any special procedure, nor is it limited to any specific matter. It applies to all proceedings for a declaration … .

And again in the case of *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, Lee Hun Hoe CJ (Sabah and Sarawak) in relation to O 15 r 16 of the RHC said at p 107:

> … The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

This is the state of affairs with regard to public servants. See *Sarjit Singh Khaira v Government of the State of Sarawak & Anor* [1990] 2 MLJ 251 and which case was concluded lately in *State Public Service commission, Sarawak v Sarjit Singh Khaira* [2000] 4 MLJ 353.

Not only does the law entitle a public servant to seek a declaratory relief in a case of dismissal, but they can also apply for relief by way of O 14 of the RHC summary judgment (see *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 in straightforward cases involving the interpretation of a few undisputed documents). The law as to a public servant in Malaysia had been set out by Raja Azlan Shah CJ Malaya (then, later LP and currently HH Sultan of Perak) in the case of *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 at p 198 where his Lordship said:

> … In *Ridge v Baldwin* [1963] 2 All ER 66, Lord Reid developed the point in an illuminating way. He said, inter alia, that in a pure master and servant case, dismissal is governed by the law of contract inter partes and there is no right to be heard. In other words, in a pure master and servant relationship, the principles of administrative law, including those of natural justice have no part to play. The administrative law remedies such as a declaration that the dismissal is ultra vires is not available; no order for reinstatement can be made.

The most that can be obtained is damages, if the dismissal is wrongful. In *Malloch v Aberdeen Corporation* [1971] 1 All ER 1278, 1294, Lord Wilberforce took that point to mean 'cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. In cases where such an element is present, Lord Wilberforce pointed out that 'there may be essential procedural requirements to be observed and failure to observe them may result in a dismissal being declared void'. In that case the House of Lords held that a school teacher had a special status conferred on him by statute which converted him from being a public servant holding office at the pleasure of a public authority into a servant who, by virtue of his statutory position, had implied that position the right to be heard. Lord Wilberforce stated (p 1294):

> 'The argument that, once it is shown that the relevant relationship is that of a master and servant, this is sufficient to exclude the requirements of natural justice is often found …. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.'

Lord Wilberforce's speech is important because it opens the way for there to be a general application of the principles of natural justice to be the employment relationship.

Clearly, this is not a straightforward case of master and servant. The appellant as an Assistant Lecturer employed by the University, has a status supported by statute and is entitled to the protection of a hearing before the appropriate disciplinary authority, including the right of appeal to the University Council from the decision of that authority. If that right is violated, as happened here, then the court may allow declaratory relief, enabling him to retain his employment and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal. The point is, here, the appellant's employment had never been terminated. It would be open to the University at any time hereafter to dismiss him if it so chooses to do and does so in a lawful manner. Until it chooses to do that the appellant's contract of employment will continue. We find it hard to believe that in a field of employment such as present, the legislature can really be said to have intended that the appellant is ipso facto to be deprived of his employment without any regard for vested right. To say that there were no disciplinary rules under which he could be charged is an argument which has only to be stated to be rejected.

The 'pure master and servant' relationship rule which Lord Reid was referring to in the *Ridge v Baldwin* case is manifested locally in the case of *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302 at p 303 where Seah SCJ said:

> …the well-established rule that a contract for service or service contract would not be specifically enforced by the High Court (see s 20(1)(b) of the Specific Relief Act 1950) and that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced (see s 54(f) of the same Act and *Hill v CA Parsons & Co Ltd*).

In 1994, Vincent Ng J in the case of *Syed Mahadzir bin Syed Abdullah v Ketua Polis Negara & Anor* [1994] 3 MLJ 391 at p 403 had this to say:

> Lastly, I recognized that in an ordinary case of master and servant, a declaration to the effect that the termination of service is null and void or that the contract of service still subsists should not be made. See *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 666 and *Francis v Municipal Councilors for Kuala Lumpur* [1962] MLJ 407. However, in *Malloch v Aberdeen Corp* [1971] 2 All ER 1278 at p 1294, Lord Wilberforce held that the point in *Ridge v Baldwin* which held that it was not open to the court to grant a declaration that the termination of service was null and void — is only applicable in cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. In cases where such an element is present, Lord Wilberforce pointed out that 'there may be essential procedural requirements to be observed and failure to observe them may result in a *dismissal being declared void*'. *Malloch v Aberdeen Corp* was cited with approval in the then Federal Court decision in *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 wherein Raja Azlan Shah CJ held that the appellant therein — who was an assistant lecturer employed by the university — had '*a status supported by statute*'. And if that right is violated as happened there, 'then the court may allow *declaratory relief, enabling him to retain his employment*, and continued eligibility to be paid his salary and all emoluments from the date of the purported dismissal'.

Recently the Federal Court in the case of *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol Negeri Sembilan & Anor* [1997] 2 MLJ 361 at p 368 had this to say also in relation to a government servant, ie a public officer:

> If the dismissal of a holder of such public office is no sufficiently carried out in accordance with the rules of natural justice and the dismissal or disciplinary procedure enacted therefor, then the dismissal is ineffective or void. Logically, the post from which he has been purportedly removed remains intact for him and he therefore continues in office. In effect, from his employer's point of view, he is reinstated to his former post. The declarations commonly sought in court in connection with such dismissal are that his dismissal is void, that he continues in office and that he is entitled to arrears of salary, etc. If he succeeds in court with such declarations, he obtains reinstatement, a word which learned counsel in this case and others are wont to shy away from as if it were repugnant. We think also that in the case of the holders of these offices, it is perfectly in order.

Further, at p 370, Peh Swee Chin FCJ (delivering the judgment of the court) added:

> Further, when the rights of the parties are regulated or governed by an ordinary contract of employment, the employee, not being a holder of public office, or where such rights are not modified or affected by any provisions of any statute, then, the fact that the dismissal of the employee is not in accordance with the procedure laid down in the contract does not prevent the dismissal from being effective to terminate the contract and the only remedy lies in damages. The employee cannot, in these circumstances, claim that the dismissal is void. A case in point for such modification by statute is *Vine v National Dock Labour Board* [1957] AC 488 (HL), in which a dock labourer - registered under a scheme embodied in the Schedule to the Dock Workers (Regulation of Employment) Order 1947 made under the Dock Workers (Regulation Employment) Act 1946 of the United Kingdom, was sacked by

> the National Dock Labour Board and his appeal to a tribunal set up under the Act was dismissed. He sued in court, inter alia, for a declaration that his dismissal was invalid or void. The House of Lords held — on the facts and the statutory provisions contained in the said Act — that his dismissal was not valid; that his name was not validly removed from the register and that he continued in the employment of National Dock Labour Board (despite the fact the successful plaintiff there was not a holder of public office holding office during the pleasure of the Crown.

Later, Peh Swee Chin FCJ continued at pp 370–371:

> A clear distinction has to be made between a declaration that a dismissal is invalid and void on the one hand and a declaration that the dismissal is wrongful on the other. The first-mentioned declaration may be granted by the court with 'what in effect is a reinstatement, ie that he continues in the employ, etc. The second-mentioned declaration is invariably granted with an order for damages only by virtue of the principle. When a dismissal is merely wrongful, at some risk of repetition, a plaintiff is left only with a remedy in damages by virtue of the principle. When a dismissal is void or invalid, the dismissal that took place earlier never in effect, effectively took place because it is void, so the old job continues. To see things in their better perspective, let us say that a void or invalid dismissal is always wrongful, but not every wrongful dismissal is an invalid or void dismissal.

For the reasons given by the various cases above, it can be seen why the courts were reluctant to give specific relief to a servant who has been dismissed by his master in the public sector and restored to giving relief by way of declaration. In seeking for this relief, the affected party could not ask for reinstatement, for reinstatement in substance is a mandatory injunction which the court in the case of breach of an employment contract will not give. This resulted in the aggrieved party seeking for a declaratory relief without any further relief and which the courts granted. However, once the court grants a declaratory relief that the dismissal of the employee is null and void, it is expected that the employer will respect and give effect to the order by which they are bound without any further consequential orders, see the judgment of *Panalal v State of Madhya Pradesh* AIR 1976 MP 48 at 50 paras 12–14 where SMN Raina J had this to say:

> 12 Apart from this, declarations claimed by Civil Servants in regard to service matters stand on a different footing. In such a case a declaratory decree serves the purpose, the consequential relief being implicit in it, and, therefore it is not necessary for the plaintiff to seek any further relief. Once a declaration has been made, the logical consequences of such declaration are implemented by the Government and therefore, it is not necessary to seek any consequential relief in such cases. A similar view was expressed by this court in *JS Dhopte v State* 1962 Jab JL (SN) 228.
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> 13 In *Lt Col GS Dutta v Union of India* AIR 1966 J & K 124 it was held that in a suit for declaration that the plaintiff was entitled to pension at a higher rate, omission to seek the relief in consequence does not disentitle the plaintiff to seek a declaratory decree because the plaintiff has a recurring cause of action for enhanced rate of pension in future also.
>
> 14 In a suit by a Government servant against the Government in a service matter declaration itself is sufficient because the consequential relief

follows automatically from such declaration and it is, therefore not necessary to seek it as a separate relief.

From the above cases, one can see the need why in a dismissal of a public servant the only remedy sought for is a declaration and not a reinstatement. However, our development of law shows that our courts are moving away from 'archaic and unfair traditional views' and are prepared to make the ordinary remedies available to a breach of contract case and which remedies of declaration, specific performance and injunctions in the form of a reinstatement and other allied remedies. After all the courts have this power. See *Halsbury Law Reports* (4th Ed) Vol 12(1) para 825:

> 825 Damages and equitable remedies. Where compensation by way of damages would be an inadequate remedy or is not possible equity may grant relief by ordering either an injunction or specific performance of a contract. Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages either in addition to, or in substitution for, an injunction or specific performance. This power extends to any case where the court has the jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement. The measure of damages awarded by virtue of this provision normally corresponds with that awardable at common law, but may in fact differ.

Recently, the High Court of Kuala Lumpur, in two unreported cases involving a statutory body and a statutory employee, granted the remedy of declaration as a principal remedy and consequentially the remedy of reinstatement which in law is a specific relief of mandatory injunctions. Rahmah Hussain J in the case of Dalam Mahkamah Tinggi Malaya di Kuala Lumpur Guaman Sivil No S7–22–193 Tahun 1990 antara *Haji Mohd Yusof bin Salleh lwn Ketua Pengarah Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah dan Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah* on 27 June 1995 made an order which included the common law remedies of special damages (repayment of arrears of salaries) and general damages (to be assessed by SAR) as well as equitable remedies of declaration and reinstatement, which in substance is a mandatory injunction, and interests and costs. KC Vohrah J on 25 May 1996, in the case of In the High Court of Malaya at Kuala Lumpur Civil Suit No S5–22–194–90 between *Haji Osman bin Mohd Said v Ketua Pengarah Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah; Pihak Berkuasa Kemajuan Pekebun Kecil Perusahaan Getah* also made a similar order comprising both the common law remedy of damages as well as the equitable remedy of declaration and reinstatement, which in substance is a mandatory injunction, and interests and costs.

In so granting the above two orders, the High Court was developing the common law of Malaysia in doing justice and which public policy in Malaysia demanded, Gopal Sri Ram JCA in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at p 543 said:

> Consequently, the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
>
> In my judgment, the wide power conferred by the language of para 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such reliefs as meets the ends of justice.

Our development of law is also seen in other areas and this was recently demonstrated when our courts broke away from 'antiquated shackles of restrictive traditions which the common law of England had imposed upon itself' and ventured into making its own destiny. In the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, the Federal Court hearing an appeal which commenced in the Industrial Court at the end of the hearing, instead of remitting the case back to the Industrial Court, as previously done, granted consequential relief. The same was done by the Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira s/o Pereira & Ors* [1996] 3 MLJ 489. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at p 288, the Court of Appeal disallowed the plaintiff/appellant's prayer of declaratory relief and instead made an order reducing the appellant's rank pursuant to a letter of the department and also order that all the appellant's arrears of salary and other emoluments be paid, or in other words the Court of Appeal literally granted the appellant the order of reinstatement but to a lower post based on the facts of the case and ancillary to it, the arrears of salaries and other emoluments due to the appellant. In coming to this decision Gopal Sri Ram JCA said at pp 300–301:

> In arriving at my conclusion on the remedy that ought to be given in this case, I have derived much assistance from the judgment of Edgar Joseph Jr (as he then was) in *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487, which I have already described as an important decision. In that case, recognition was afforded by his Lordship to move away from the technicalities of particular remedies and to the achievement of substantial justice. The relevant passage in the judgment of his Lordship is at p 489 of the report and it reads as follows:
>
> > 'I would, however, in passing, and as a matter of general interest, remark that there are dicta in administrative law cases in the UK which indicate that judges there are beginning to depart from their traditional preference of dealings with the technicalities of remedies rather than the principle governing official action and individual rights. For example, in a recent immigration case *Bugdaycay v Secretary of State for the Home*

Department[1987] 1 All ER 940, in the House of Lords, Lord Bridge stated that courts are entitled within limits:

> "to submit an administrative decision to more rigorous examination, to ensure that it is no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

And Lord Templeman said this:

> 'Where the result of flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process.'

Federal Constitution art 8(1)

The end product of the above described state of law in Malaysia with regard to master/servant relations is that employees in the private sector who are dismissed can seek reinstatement pursuant to s 20 of the Industrial Relations Act 1967, and employees in the public sector by seeking redress pursuant to remedies available in law, ie both common and at equity. Though the law on the two sections have taken two different routes, they have come to the same destination in consonant within the spirit and intend of art 8(1) of the Federal Constitution ('the Constitution') which states that 'All persons are equal before the law and entitled to the equal protection of the law'. If interpreted otherwise it would mean that employees in the private sector who are unfairly dismissed can seek the relief of reinstatement whereas employees in the public sector cannot. If this situation is permitted to exists then this law would fall foul of art 8(1) of the Constitution for in law every person in this country is equal whether they are employees in the private or public sector and are entitled to equal protection of the law. Abdul Malek Ahmad JCA (now FCJ) talking of art 8 of the Constitution in the case of *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 at p 253 said:

> The intent of the article denotes that all employees shall be treated alike under like circumstances both in privileges and obligations and it must be ensured that there is equality among equals and that persons similarly placed are not discriminated against and denied equal treatment.

Even though Abdul Malek Ahmad JCA (as he then was) was referring to a situation of a single employer and his many employees, this statement of law is good for general application in that before the court, different employers stand on the same platform when seeking justice from the court. The courts while granting relief to one section of the national workforce does not and cannot deny relief to another sector of the same national workforce. To so deny that relief would be in blatant violation of art 8(1) of the Constitution.

On this, I rule that the court has powers to grant the consequential prayers sought by the plaintiff for it is the guiding principle of the law that 'not only justice must be done but it must be seen to be done'.

Employment is a fundamental right

One last point is that the position of employees today is so much different from the time the common law developed. During the development of the common law employment was at the pleasure of the employer, a very medieval concept based on medieval thinking emanating from medieval culture. By today's law, employment is a fundamental right. See the Court of Appeal judgment of Gopal Sri Ram JCA in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at p 288 where he said:

> In my judgment, the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning.
>
> Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.

And at p 289 he cited with approval the Indian case of *Dehli Transport Corp v DTC Mazdoor Congress & Ors* 1991 Supp 1 SCC 600 at p 717, Satwant J when delivering the majority judgment of the Supreme Court said:

> The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.

See also the judgment of the Court of Appeal of Gopal Sri Ram JCA in the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, where at p 510 he said:

> *Employment as fundamental right*
> Quite apart from being a proprietary right, the right to livelihood is one of those fundamental liberties guaranteed under Pt II of the Federal Constitution. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and the cases cited therein. The reasons for the view taken having been expressed by the majority in that case, I find it unnecessary to repeat them here. Suffice to say that the expression 'life' appearing in art 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

A And again, Gopal Sri Ram JCA in the case of *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l Perumal* [2000] 3 MLJ 281 at p 294 said:

> Now, it cannot be gainsaid that any sort of punishment imposed upon a public servant has serious consequences. It carries with it a stigma. It tarnishes
B reputation. The authorities are now well settled that the punishment of dismissal deprives a person of his livelihood and therefore of his life' within the meaning of that expression in art 5(1) of the Federal Constitution. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan* [1996] 1 MLJ 481.

C In this case, the defendant had dismissed the plaintiff from his employment and the court has declared that the dismissal was null and void and since the law is that employment is a fundamental right within the expression of art 5(1) of the Constitution, it is imperative that the function of the court is to ensure that the plaintiff gets his job back and together with his arrears of salaries and all other emoluments.

D

Disobedience of a court order

The defendant dismissed the plaintiff in 1985. The plaintiff filed the main case in 1987 and prayer one and prayer three of the summary judgment was given on 18 July 1994 and on which there was no appeal. This case shows
E protracted multiplicity of cases and the defendant has done everything within its means to both deny the plaintiff the fruits of summary judgment prayer three, as well as fruits of the summary judgment prayer one when these prayers became final without an appeal from that decision. The court is not concerned with the RM2.2m for that issue is not before this court and I will not touch on that subject. This court is only concerned with prayer
F one. The defendant has not obeyed the order by giving effect to the order of the court made on 18 July 1994 as required by law. By law, the defendant is under duty to give effect to such order. Though the order made on 18 July 1994 was a declaratory order, it was still an order of the High Court and carried the command that it should be given effect. This is particularly so
G when there was no challenge that the order made was without jurisdiction and/or the order was irregular or a nullity order. The leading case for this is *Hadkinson v Hadkinson* [1952] 2 All ER 567 and where the court said:

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.

H

This case has been followed in Malaysia. See the judgment of Abdul Hamid Omar LP in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 at p 220 where his Lordship said:

> *Obedience to Court Order*
>
I It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore

> does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

This is particularly so when the defendant is a public authority and is expected to set an example of obeying a court order but instead the defendant has been obstinately disobedient and stands the risk of facing the charge of not obeying a court order. To hold otherwise would mean that a recalcitrant litigant can treat a High Court order with impunity as a useless piece of paper.

Can the court give further consequential orders?

Under the abovesaid circumstances, is this court powerless to compel the defendant upon whom the order is made and is binding to give effect to the order made on 18 July 1994. The law states otherwise for every order the court makes carries with it an implied liberty to apply to court. *Fritz v Hobson* (1880) CHD 542, *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226, *Societe des Etains De Bayas Tudjub v Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

The Federal Court in *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 119 at p 120 said:

> … that aside, all orders of court carry with them in gremio liberty to apply to the court (*Fritz v Hobson*) (at p 561 per Fry J) as this is implied without it being expressly reserved (*Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi, Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2*).

The meaning of 'liberty to apply' has been eloquently defined by Jenky J in the Supreme Court of New South Wales, Family Law division in the exercise of Federal jurisdiction in the case of *Nicholson v Nicholson*, ALR Vol 4 1997 p 212 at 216 where his Lordship said:

> 'Liberty to apply' is simply a device by which further orders may be made when necessary for the purpose of implementing and giving effect to the principal relief already pronounced; See *Christel v Christel* [1951] 2 KB 725.

In *Christel v Christel* (1951) 2 KB 725 at p 730 Sommervile LJ said:

> … As I have said, prima facie the words 'Liberty to apply' refer, in my opinion, to the working out of the actual terms of the order.

Further, there is authority to state that when a given court order is not of final character and something more has to be done, that court can give further order or orders under the 'liberty to apply rule'. *Penrice v Williams* (1883) 23 Ch D 353.

In the instant case, since the defendant has not given effect to the declaratory order given by the High Court on 18 July 1994, the plaintiff is entitled to apply to the court under the 'liberty to apply rule' for the purpose of implementing and give effect to the order dated 18 July 1994, for the rule of the court is *lex non deficit in justitia exhibenda* which in simple English means that the law does not fail in dispensing justice.

A further route was shown by Gopal Sri Ram JCA in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 at p 301 by giving appropriate remedies under the prayer 'further or other relief that this honourable court thinks fit' and said:

> In his statement of claim, the appellant has also prayed for 'further or other relief as this Honourable Court thinks fit'. In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 at p 160, a prayer in a statement of claim read 'Any other relief which this Honourable court deems fit to grant. Salleh Abas FJ (as he then was) said that this prayer 'must not be treated as a mere ornament to pleadings devoid of any meaning'.
>
> I am of the view that the same may be said of the like prayer in the present case. This court should, in my judgment, award the appellant such relief as is appropriate in the circumstances of the case.

I am bound by this view that not only an appellate court has powers to grant the appropriate remedy on appeal but also add that the court of first instance hearing an application for consequential relief also have powers to dispense appropriate remedies under the heading of 'other relief the honourable court deems fit'. Since the plaintiff in the main case has asked for 'any other relief that this honourable court thinks fit', I hold that the consequential relief sought by the plaintiff in this originating summons in substance emanates from the plaintiff's prayers of 'further or other relief that this honourable court deems fit' in the main action.

Therefore, I grant order in terms of prayers one, two and three of the plaintiff's originating summons, which is:

(1) bahawa plaintif ditempatkan semula kepada jawatan penyelia trafik di defendan dengan segala emolumen-emolumen dan elaun-elaun yang terhutang kepada beliau sekiranya plaintif berterusan bekerja;

(2) bahawa faedah diberikan ke atas segala emolumen-emolumen dan elaun-elaun tersebut pada kadar 8% setahun dari 19 Julai 1994 sehingga tarikh penyelesaian penuh; dan

(3) kos permohonan ini dibayar oleh defendan kepada plaintif.

Order accordingly.

Reported by Jafisah Jaafar